STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 25, 2003
v	No. 239767 Oakland Circuit Court
LURDUA COUSINS, Defendant-Appellant.	LC Nos. 00-174122-FH; 00-174123-FH; 00-174124-FH

Before: Owens, P.J., and Griffin and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and delivery of more than 50 but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to one to twenty years in prison on each of the delivery of less than fifty grams of cocaine convictions and to ten to twenty years in prison for the delivery of more than 50 but less than 225 grams of cocaine conviction. The sentences are to run consecutively to one another. We affirm.

I. FACTS

This case arises from the sale of cocaine, on three different occasions, by defendant to an undercover police officer. Officer Christopher Schwartz was introduced to defendant by a third person and was given defendant's pager number and a telephone number. On September 28, 1998, Schwartz called defendant's telephone number and left a message. Shortly thereafter, Schwartz received a page from defendant. Schwartz and defendant agreed that Schwartz would purchase a quarter ounce of cocaine for $325 from defendant. They agreed to meet at Ann's Lounge in the city of Warren. Schwartz went to Ann's Lounge. When he did not see defendant in the building he walked out to the parking lot. He saw defendant in the parking lot, defendant said "hey," and motioned for Schwartz to get in defendant's car. Schwartz paid for and received the cocaine from defendant. Schwartz stayed in the car for a couple of minutes.

On October 6, 1998, Schwartz and defendant spoke and agreed to meet for Schwartz to buy another quarter ounce of cocaine for $350. Schwartz met with defendant to make the purchase. Defendant was driving a 1986 Honda. Defendant got into Schwartz' car and there was another exchange of a quarter ounce of cocaine for $350. Schwartz told defendant that the

price was high and asked defendant about either lowering the price or letting Schwartz buy more with a break on price. Defendant told Schwartz that an ounce would cost $1,000 to $1,100.

On October 13, 1998, Schwartz called defendant's pager number and defendant called him back that day. Schwartz asked him what two ounces of cocaine would cost and defendant told him $2,400. Later that day, Schwartz and defendant agreed to meet at Ann's Lounge for Schwartz to buy two ounces of cocaine for $2,300. That night, Schwartz and defendant met. Schwartz gave defendant $2,300 in exchange for the two ounces of cocaine.

After each of the deliveries, Schwartz had the suspected cocaine field tested and then taken back to the office where it was heat sealed and tagged as evidence. Schwartz attempted to make further contact with defendant but he was unsuccessful. He paged defendant but never received a call back. When he was unable to complete another deal, he went to the prosecutor's office to obtain warrants for defendant's arrest. Defendant was eventually arrested on July 3, 2000.

Defendant filed a pretrial motion to dismiss the charges against him claiming that his due process rights were violated by a pre-arrest delay. On December 6, 2000, the trial court denied defendant's motion for the reason that defendant failed to demonstrate any prejudice as a result of the delay. On August 10, 2001, defendant filed a motion to suppress alleging there was an improper identification procedure when Christopher Schwartz, the sole witness in this case, viewed defendant's mug shot in an effort to identify him.

An evidentiary hearing was held on November 14, 2001, with Schwartz as the only witness. On January 7, 2002, the trial court issued an opinion and order denying defendant's motion to suppress the in-court identification of defendant by Schwartz for the reason that Schwartz "already knew the identity of Defendant prior to the photographic identification" and that there was an independent basis for Schwartz' identification of defendant. On January 8, 2002, defendant was found guilty, by jury, of two counts of delivery of less than fifty grams of cocaine and delivery of more than 50 but less than 225 grams of cocaine.

After filing a claim of appeal, defendant filed a motion to remand for an evidentiary hearing on the issue of ineffective assistance of counsel. On February 20, 2003 the motion was denied. On January 30, 2003, defendant filed a motion for peremptory reversal. This motion was denied on March 18, 2003, for failure to persuade this Court of the existence of manifest error requiring reversal and warranting peremptory relief without argument or formal submission. On May 6, 2003, defendant filed a second and untimely motion to remand for an evidentiary hearing to develop his claim for ineffective assistance of counsel, this time citing counsel's failure to pursue an alibi defense, failure to impeach the prosecution's sole witness, and failure to call an expert witness on the topic of identification testimony. This motion was also denied.

II. PRE-ARREST DELAY

A. Standard of Review

A trial court's decision whether to dismiss charges because of prearrest delay is reviewed for an abuse of discretion. *People v Herndon,* 246 Mich App 371, 389; 633 NW2d 376 (2001).

An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will, the defiance of reason, and the exercise of passion or bias or when an unprejudiced person considering the facts on which the trial court acted would conclude that there was no justification or excuse for the ruling made. *People v Cress*, 250 Mich App 110, 149; 645 NW2d 669, rev'd on other gds __ Mich __; 664 NW2d 174 (2003); *People v Miller*, 198 Mich App 494, 495; 499 NW2d 373 (1993).

B. Analysis

Defendant first argues on appeal that the trial court erred in denying his motion to dismiss brought on the basis of prearrest delay. We disagree. To a limited extent, procedural due process guarantees protect a defendant against delay between the commission of a crime and arrest for that offense. *US v Lovasco*, 431 US 783, 798; 97 S Ct 2044; 52 L Ed 2d 752, 758 (1977); *People v Cain*, 238 Mich App 95, 109; 605 NW2d 28 (1999); *People v Bissard*, 114 Mich App 784, 788; 319 NW2d 670 (1982). To merit reversal of a defendant's conviction, a prearrest delay must have resulted in actual and substantial prejudice to the defendant's right to a fair trial and the prosecution must have intended a tactical advantage. *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). The defendant bears the burden of coming forward with evidence of prejudice resulting from the delay and the prosecutor bears the burden of persuading the court that the reason for the delay was sufficient to justify whatever prejudice resulted. *Id*.; *People v Adams*, 232 Mich App 128, 134-135; 591 NW2d 44 (1998). To be substantial, the prejudice to the defendant must have meaningfully impaired his ability to defend against the charges such that the outcome of the proceedings was likely affected. *Crear, supra*, 242 Mich App 166. An unsupported statement of prejudice by defense counsel is not enough, *People v Williams*, 114 Mich App 186, 202; 318 NW2d 671 (1982), nor are undetailed claims of loss of physical evidence, witness memory loss, or witness death, *Crear, supra*, 242 Mich App 166; *Adams, supra*, 232 Mich App 136-137; *People v Loyer*, 169 Mich App 105, 119; 425 NW2d 714 (1988).

The prearrest delay in this case, approximately twenty months, is substantial. However, defendant has failed to come forward with a detailed claim of loss of evidence or with any allegation that the delay was occasioned by the prosecution's attempt to obtain a tactical advantage. Defendant merely asserts, without explication, that the delay resulted in the loss of exculpatory evidence, testimony and potential witnesses. This allegation does not establish that the delay meaningfully impaired defendant's ability to defend against the charges against him and is insufficient to shift the burden of proof from defendant to the prosecution. Where defendant fails to identify the witnesses or the substance of the information allegedly lost to him, and where defendant offers no evidence showing that the delay was intended to secure a tactical advantage on the part of the prosecution, the trial court does not err in denying defendant's motion to dismiss. *People v White*, 208 Mich App 126, 134-135; 527 NW2d 34 (1994).

III. SPEEDY TRIAL

A. Standard of Review

As defendant did not properly preserve this issue, we review the issue for plain error which affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. Analysis

We disagree with defendant's next contention, that defendant's right to a speedy trial was violated by the eighteen month delay between his arrest and trial. The right to a speedy trial is guaranteed to criminal defendants by the federal and Michigan constitutions as well as by statute. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1; *Cain, supra*, 238 Mich App 111. In determining whether a defendant has been denied a speedy trial, four factors must be balanced: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182, 2192; 33 L Ed 2d 101 (1972); *People v Hill*, 402 Mich 272, 283; 262 NW2d 641 (1978); *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000). The defendant must prove prejudice when the delay is under eighteen months. *People v Collins*, 388 Mich 680, 695; 202 NW2d 769 (1972); *Cain, supra*, 238 Mich App 112. If the delay not attributable to defendant exceeds eighteen months, prejudice to defendant is presumed and the burden of proving lack of prejudice shifts to the prosecutor. *People v Holtzer*, 255 Mich App 478, 493; 660 NW2d 405 (2003); *Cain, supra*, 238 Mich App 112. In assessing the reasons for the delays, each period of delay is examined and attributed to the prosecutor or the defendant. *People v Ross*, 145 Mich App 483, 491; 378 NW2d 517 (1985). Delays caused by the adjudication of defense motions are attributable to the defendant. *People v Gilmore*, 222 Mich App 442, 461; 564 NW2d 158 (1997). The defendant's failure to promptly assert his right to a speedy trial weighs against his subsequent claim that he was denied the right. *People v Rosengren*, 159 Mich App 492, 508; 407 NW2d 391 (1987). A general allegation of prejudice caused by delay, such as the unspecified loss of evidence or memory, or financial burden, is insufficient to establish that a defendant was denied his right to a speedy trial. *Gilmore, supra*, 222 Mich App 462; *People v Cooper*, 166 Mich App 638, 655; 421 NW2d 177 (1987); *People v Wyngaard*, 151 Mich App 107, 111-112; 390 NW2d 694 (1986).

The delay in this case, from defendant's arrest to the trial date, is almost exactly eighteen months. However, once the delay attributable to defendant is factored out of the time frame, the delay shrinks to less than eighteen months. Defendant filed a motion to suppress on August 3, 2001, which required an evidentiary hearing held on November 14, 2001. This three month delay, a result of defendant's motion, is attributable to defendant. Further, at the conclusion of the evidentiary hearing, the trial court entered an order adjourning the trial date for forty-nine days to allow the parties to file briefs on the legal issues raised by the evidentiary hearing. This delay is also attributable to defendant. Finally, defendant stipulated to an adjournment of a pretrial date for two weeks, from November 13, 2000, to November 27, 2000. Subtracting these delays, which defendant either stipulated to or was responsible for due to his motion to suppress, the delay is reduced from eighteen months to approximately thirteen months. Because the delay is less than eighteen months, defendant must prove prejudice. *Holtzer, supra,* 255 Mich App 492-493. Defendant's allegations of prejudice do not get beyond general statements regarding loss of exculpatory evidence or testimony and loss of potential witnesses. Credence will not be given to an unsupported claim of loss of evidence or loss of potential exculpatory witnesses. *Gilmore, supra,* 222 Mich App 462.

The fact that the delay not attributable to defendant was just over a year, together with defendant's inability to prove prejudice and the fact that defendant did not assert the right to a speedy trial below, all weigh in favor of the prosecution. The last factor to be considered, the

reason for the delay, not attributable to defendant or due to stipulation to adjourn, is not clear on the record before this Court. Assuming that the reason for the delay would favor defendant, the fact that the other three factors weigh heavily against him dictate that the balancing of all the factors results in a finding against defendant, i.e., that his right to a speedy trial was not violated.

Defendant glancingly argues that defense counsel was ineffective for failing to assert defendant's right to a speedy trial before the trial court. As this issue is not set forth in the statement of questions presented, it will not be considered on appeal. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

IV. PHOTO IDENTIFICATION AND MOTION TO SUPPRESS

A. Standard of Review

A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *People v Kurylczyk*, 443 Mich 289, 303 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993).

B. Analysis

Defendant next argues that the trial court erred in denying defendant's motion to suppress the undercover officer's in-court identification of defendant as the man who sold the officer cocaine on three separate occasions.

After taking testimony at an evidentiary hearing, the trial court issued an opinion and order denying defendant's motion to suppress in-court identification of defendant by the officer:

> The court finds that Officer Schwartz already knew the identity of Defendant prior to the photographic identification. Defendant has failed to demonstrate how there was any substantial likelihood of misidentification. In addition, the Court finds that there was an independent basis for the identification. Officer Schwartz was able to identify Defendant as the person from whom he was to purchase the cocaine. Officer Schwartz was in the immediate presence of Defendant and conversed with him. Therefore, Defendant's Motion to Suppress Identification must be denied.

Photographic showups are used to identify the perpetrator of a crime where the witness of the crime does not know the identity of the perpetrator. See *Kurylczyk, supra*, 443 Mich 289; *People v Kachar*, 400 Mich 78; 252 NW2d 807(1977); *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001). In this case, the officer knew the perpetrator. He identified defendant on each occasion that they met. The officer was requested to view a photograph. The officer obtained and viewed a photograph of defendant to make sure that the person selling the officer drugs was named Lurdua Cousins and not Eldridge Cousins, as the cross-referencing of defendant's phone number indicated might have been the case. The officer testified that it was possible that "Lurdua" was an alias and obtaining a picture of defendant was done to guard against the possibility that defendant would be named incorrectly in the warrant. The photograph was obtained for name verification and not for identification of an unknown person.

Therefore, the officer's viewing of the defendant's photograph did not constitute an impermissible photographic showup. It is therefore unnecessary to analyze whether there was an independent basis for the officer's in-court identification of defendant.

Defendant's next assignment of error, that the trial court erred in admitting the officer's testimony that the car driven to two of the drug sales was owned by defendant under a junk title, also fails. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Defendant argues that the admission of the officer's testimony of the information from the Secretary of States office regarding the title to defendant's car was error where the prosecutor violated MCR 6.201(H) in failing to provide the information to defendant before trial. MCR 6.201(H) provides that, if a party discovers additional information or material subject to disclosure under MCR 6.201, the party must promptly notify the other party.

A review of MCR 6.201 indicates that the officer's testimony, that the 1996 Honda was registered to defendant under a junk title, does not fall within any of the subheadings of discoverable material under MCR 6.201(A) or (B). Because MCR 6.201(A) or (B) do not apply, the continuing duty to supply information under MCR 6.201(H) did not apply to this case. Therefore, the prosecutor was not required to turn over the information from the Secretary of State as part of a continuing duty under MCR 6.201(H). The prosecutor's failure to provide defendant with the report from the Secretary of State did not violate any duty to disclose on the prosecutor's part and the trial court did not err in overruling defense counsel's objection on this basis.

V. DISCOVERY

A. Standard of Review

As this is a different basis for the objection to the admission of the evidence than that which was asserted below, this issue is not preserved for appellate review and will be reviewed for plain error which affected substantial rights. Reversal is warranted only when plain error resulted in the conviction of an actually innocent person or seriously affected the fairness, integrity or public reputation of the proceedings. MRE 103(a)(1); *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999).

B. Analysis

Defendant next argues that Schwartz' testimony regarding the car constituted inadmissible hearsay testimony under MCR 803(5) and its admission resulted in a miscarriage of justice and harmed defendant's right to a fair trial. Even assuming error on the trial court's part in admitting the challenged testimony, the unrelieved evidence of defendant's guilt negates any claim that the admission of this evidence affected the outcome of the trial, nor did it affect the integrity, reputation or fairness of the proceedings.

VI. SENTENCING

A. Standard of Review

Because defendant failed to preserve the issue by objecting at sentencing, review is limited to whether there was plain error which affected substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

B. Analysis

Next, defendant challenges the sentence for his conviction of delivery of more than 50 but less than 225 grams of cocaine.[1] Defendant argues that a minimum sentence of ten years and a maximum sentence of twenty years as a fourth habitual offender convicted of delivery of more than 50 but less than 225 grams of cocaine is a violation of the federal constitutional protection against cruel and unusual punishment. This Court, in *People v Northrop*, 213 Mich App 494, 499; 541 NW2d 275 (1995), habeas corpus gtd 265 F3d 372 (CA 6, 2001), found that the mandatory sentence of ten to twenty years in prison for the offense of possession of 50 to 224 grams of a narcotic is not cruel or unusual punishment. Here, defendant is convicted of delivery of a narcotic in the same amount. The offense of possession of a narcotic is a cognate included offense of delivery of a narcotic. *People v Marji*, 180 Mich App 525, 530; 447 NW2d 835 (1989). Because a sentence of ten to twenty years for possession of more than 50 grams but less than 225 grams of a narcotic is not cruel and unusual punishment, the same sentence for delivery of the same amount of a narcotic, which is a more serious offense, does not constitute cruel and unusual punishment.

Defendant also argues that the police engaged in sentence entrapment and the trial court erred in failing to take this misconduct into account when sentencing defendant. A review of the record indicates no support for this argument. Sentencing entrapment occurs when a defendant is entrapped into committing a greater offense than he is otherwise disposed to commit and is therefore subject to greater punishment. *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997). Outrageous government conduct which overcomes the will of a defendant predisposed to deal only in small quantities of drugs, for the purpose of increasing the amount of drugs and the resulting sentencing imposed constitutes sentencing entrapment. *Id.*, 510-511.

In this case, Schwartz asked to buy a larger amount of cocaine in the third transaction and defendant did not hesitate to supply Schwartz with two ounces of cocaine. There is absolutely no evidence of outrageous conduct which overcame defendant's will. There is no basis for defendant's claim of sentence entrapment.

Finally defendant argues that the trial court erred in failing to adequately take into consideration defendant's rehabilitative potential in formulating its sentence and this constituted cruel and unusual punishment. While a trial court can depart from a mandatory minimum term

[1] While defendant assigns error in the statement of questions presented to all three of his sentences, he argues the merits of the issue with regard to only the sentence on his conviction for delivery of more than 50 but less than 225 grams of cocaine. Therefore, we review only this sentence on appeal. *People v Jones(On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

of imprisonment if it finds on the record that there are substantial and compelling reasons to do so, MCL 333.7401(4); MCL 333.7403(3); *People v Daniel*, 462 Mich 1, 4; 609 NW2d 557 (2000), the statutory minimums generally presume that the applicable minimum was the appropriate sentence, and a legislatively mandated sentence is thus presumed to be a proportionate and valid sentence, *People v Poppa*, 193 Mich App 184, 187-188; 483 NW2d 667 (1992); *People v Davis (On Rehearing)*, 250 Mich App 357, 369; 649 NW2d 34 (2002); *People v Williams*, 189 Mich App 400, 404; 473 NW2d 727 (1991).

The statutory authorization to depart downward from the required minimum sentence was intended to vest sentencing courts with discretion only in exceptional cases, and the court's discretion was narrow. *People v Perry*, 216 Mich App 277, 282; 549 NW2d 42 (1996); *People v Downey*, 183 Mich App 405, 416; 454 NW2d 235 (1990). The court was to start with the presumption that the mandatory minimum sentence was appropriate and depart from it only when there were substantial and compelling reasons to do so. *Downey, supra* at 413. A determination that a departure was merited had to be based on objective and verifiable factors. *Daniel, supra*, 462 Mich 6. The determination whether the factors constituted substantial and compelling reasons to depart from the minimum was reviewed on appeal for an abuse of discretion. *People v Babcock*, __ Mich __; 666 NW2d 231, 243 (2003). *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995); *People v Nunez*, 242 Mich App 610, 617; 619 NW2d 550 (2000). An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes. *Babcock, supra*, 666 NW2d 243.

The trial court did not abuse its discretion in sentencing defendant on the basis of defendant's rehabilitative potential where the facts clearly indicated a decided lack of potential for rehabilitation. The offense of delivery of more than 50 but less than 225 grams of cocaine carries a penalty of imprisonment for not less than ten years and not more than twenty years. MCL 333.740(2)(a)(iii). At sentencing, through his attorney, defendant acknowledged that he had three prior felony convictions, and the presentence report indicates that he actually had five prior felony convictions and one misdemeanor. The prior felonies include first-degree criminal sexual conduct and armed robbery for which defendant served a sentence of twelve to twenty years. Neither the prior convictions, nor the long sentence imposed on defendant previously, served to change his propensity to get into trouble, and, at forty-five years old, defendant's ability to rehabilitate himself seems marginal. As the defendant's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law, the trial court did not err in sentencing defendant. *People v Colon*, 250 Mich App 59, 65; 644 NW2d 790 (2002).

Affirmed.

/s/ Donald S. Owens
/s/ Richard Allen Griffin
/s/ Bill Schuette